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No. 14-144

In the Supreme Court of the United States

JOHN WALKER III, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE BOARD, ET. AL.,
Petitioners,

v.

TEXAS DIVISION, SONS OF CONFEDERATE VETERANS, INC., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICI CURIAE* PHIL BERGER, PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE, AND TIM MOORE, SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES, IN SUPPORT OF NEITHER PARTY

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INTERESTS OF *AMICI*[1]

Phil Berger, President Pro Tempore of the North Carolina Senate, and Tim Moore, Speaker of the North Carolina House of Representatives, are the leaders of the North Carolina General Assembly as well as the Petitioners in *Berger v. American Civil Liberties Union of North Carolina*, Case Number 14-35, which petition remains pending before this Court.[2] Because the Fourth Circuit held that North Carolina's legislatively enacted "Choose Life" specialty license plate was unconstitutional, *Amici*'s petition presents the following question: "Whether the government speech doctrine permits the State of North Carolina to promote its 'Choose Life' message through a specialty plate program over which it exercises complete and effective control without also offering a pro-choice specialty plate." As a result, President Pro Tem Berger and Speaker Moore have

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[1] The parties have submitted written consents to the filing of amicus briefs in this case. As required by Rule 37.6, *Amici* state that no counsel for a party authored this brief in whole or in part and that no person other than the *Amici* and their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

[2] On January 14, 2015, Representative Tim Moore was selected as Speaker of the North Carolina House of Representatives, replacing Speaker Thom Tillis who was sworn in as a United States Senator on January 6, 2015. Pursuant to Rule 35.3 of the Rules of the Supreme Court of the United States, Speaker Moore is automatically substituted as a party to the petition that is pending before this Court: "When a public officer who is a party to a proceeding in this Court in an official capacity ... ceases to hold office, the action does not abate and any successor in office is automatically substituted as a party."

a direct interest in the present case, which also implicates the government speech doctrine in the specialty license plate context. *See Hollingsworth v. Perry*, 133 S. Ct. 2652, 2664 (2013) ("No one doubts that a State has a cognizable interest 'in the continued enforceability' of its laws that is harmed by a judicial decision declaring a state law unconstitutional.").

Moreover, *Amici* believe that North Carolina's experience in legislatively enacting specialty license plates and controlling their submission, review, editing, approval, and production will provide this Court with an important perspective on why the government speech doctrine should apply to legislatively controlled specialty plate programs regardless of how the Court applies the doctrine to an administratively controlled program like Texas's.

SUMMARY OF ARGUMENT

The central question in this case is whether specialty license plates are government speech. Under *Johanns v. Livestock Marketing Assoc.*, 544 U.S. 550 (2005) and *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), the answer with respect to legislatively enacted specialty plates is unequivocally "yes."

The government speech doctrine protects a State's "right ... 'to say what it wishes,' and to select the views that it wants to express." *Id.* at 467-68 (citations omitted). As a result, in selecting its desired views, a State can exclude unwanted or inconsistent messages. *See id.* at 480 (explaining that the government can accept a donated war memorial while rejecting another "monument

questioning the cause for which the veterans fought"). Moreover, the government retains "this same freedom to express its views when it receives assistance from private sources for the purpose of delivering a government-controlled message." *Id.* at 468.

States that enact specialty license plates through legislation do all of these things—select specialty plate designs that convey a message that each State wants to promote (*e.g.*, "Choose Life"), reject designs that the State does not want to be associated with (*e.g.*, "Respect Choice"), and use third party volunteers to distribute their chosen message. Thus, legislatively enacted specialty plates are government speech.

Johanns and *Summum* confirm this result, finding government speech where the government "effectively controlled" the message and "exercis[ed] 'final approval authority'" over the selection, content, and design of the speech. *Id.* at 473 (quoting *Johanns*, 544 U.S. at 560-61). When legislatively approving specialty plates or monuments, the government "select[s] those [messages] that it wants to display for the purpose of presenting the image of the City [or State] that it wishes to project to all who frequent the Park [or see the specialty plates]." *Id.*

Moreover, the reasonable observer test—as well as the Fourth Circuit's multi-factor test from which it is derived—is an improper and unworkable standard for at least two reasons. First, the reasonable observer test is inconsistent with *Johanns* and *Summum*. In *Johanns*, this Court concluded that the "Beef, It's What's for Dinner" ads were government speech even though a reasonable

observer would not have identified the government as the speaker. *See Texas Div., Sons of Confederate Veterans, Inc. v. Vandergriff*, 759 F.3d 388, 402 (2014) (Smith, J., dissenting) ("If a 'reasonable observer' test were the law, then [*Johanns*] was incorrectly decided."). In adopting *Johanns*, *Summum* expressly relied on the City's having complete and effective control over its monuments. Yet the reasonable observer test ignores this teaching and fails to distinguish between the different levels of control that States exercise over their specialty plate programs.

Second, the Circuits that have adopted a reasonable observer standard have done so based on a fundamental misunderstanding of *Wooley v. Maynard*, 430 U.S. 705 (1977). *See Vandergriff*, 759 F.3d at 395 (asserting that *Wooley* "presumed that the license plates were private speech"). Under *Wooley*, the Maynards could bring a compelled speech claim only because New Hampshire required them to be "a 'mobile billboard' for the *State's ideological message*." 430 U.S. at 715 (emphasis added). That is, the government speech and compelled speech inquiries were distinct. The Court determined that New Hampshire's legislatively enacted plate was government speech and then concluded that New Hampshire impermissibly forced the Maynards to carry the State's message.

Finally, *Summum* provides an independent basis for rejecting the forum analysis that several Circuits have applied to legislatively enacted specialty plates: the forum doctrine would "defeat[ ] the essential function of the ... [specialty plate] program." *Summum*, 555 U.S. at 478. Consistent with *Summum*'s discussion of monuments, States with

legislatively controlled specialty plate programs "select[ ] those [specialty plates] that [the State] wants to display for the purpose of presenting the image of the [State] that it wishes to project to all who" see its specialty plates. *Id.* at 473. Applying this Court's forum doctrine would force these States to authorize specialty plates that contradict their chosen messages, thereby undermining their right "to select the views that [they] want[ ] to express" and defeating the purpose of the program. *Id.* at 468. Thus, "forum analysis is out of place" in the context of legislatively enacted specialty plates. *Id.* at 480.

ARGUMENT

To date, lower courts have had difficulty discerning whether States are speaking government messages through their specialty plate programs. As a result of this uncertainty, these courts have promulgated conflicting tests for government speech (the control, reasonable observer, and multi-factor tests) and classified specialty plates in different ways (as government, private, and hybrid speech). In fact, even though this Court applied the government speech doctrine in *Johanns* and *Summum*, the Fifth Circuit alleged that this Court has never articulated a test for government speech. *Vandergriff*, 759 F.3d at 393. Thus, there is a pressing need for this Court to clarify the appropriate standard for government speech. This is particularly so in the specialty license plate context where the lower courts have addressed different kinds of specialty plate programs but have not clarified how the different levels of governmental

control affect the constitutional analysis under *Johanns* and *Summum*.

Consequently, in articulating a constitutional test for specialty plate systems, this Court should adopt a standard that accounts for the variety of specialty plate programs that States have created. As the Fifth and Ninth Circuits acknowledge, specialty plate programs may range from legislatively enacted systems (where a State legislature has complete control over the process) to an assortment of administrative programs (through which States cede differing levels of control to agencies, private organizations, or individuals). *See Vandergriff*, 759 F.3d at 396 (distinguishing *American Civil Liberties Union of Tenn. v. Bredesen*, 441 F.3d 370 (2006) because in *Bredesen* "the Tennessee legislature itself had passed an act specifically authorizing, creating, and issuing a 'Choose Life' specialty license plate"); *Arizona Life Coalition, Inc. v. Stanton*, 515 F.3d 956, 966 (2008) (stating that "[t]he Commission's de minimis editorial control over the plate design and color does not support a finding that the *messages* conveyed by the organization constitute government speech"). Texas's specialty plate program, which establishes three different ways to create and approve specialty license plates, illustrates this point well. *See* Tex. Transp. Code Ann. § 504.601-504.663 (legislative procedure), § 504.6011(a) (third party vendor), and § 504.801(a) (administrative procedure).

The effective control test set forth in *Johanns* and *Summum* provides the proper standard. Focusing on the government's control over the speech accounts for the different types of specialty plate programs, allowing States to retain control over their specialty

plate programs through a legislative process while protecting the First Amendment rights of individuals if the State relinquishes such control through an administrative procedure.

I. The Government Speech Doctrine Permits States to Determine the Content of Legislatively Enacted Specialty Plates.

The hallmarks of government speech under *Johanns* and *Summum* are the government's effective control over the speech and its exercise of final approval authority over the content and design of the message. Thus, where government officials have complete authority over the content, design, and approval of specialty license plates, the State is speaking, and the First Amendment viewpoint non-discrimination principle is inapplicable. And, as *Johanns*, *Summum*, and *Rust* instruct, the fact that third parties volunteer to distribute that message—and are willing to pay more for the privilege of doing so—does not convert government speech into private speech.

A. Legislatively Controlled Specialty Plates Are Government Speech under *Johanns* and *Summum* Because the Government Retains Effective and Complete Control over Their Content and Design.

Any analysis of the government speech doctrine must begin with this Court's two most recent government speech decisions—*Johanns* and *Summum*. A careful review of these cases shows that, contrary to the Fourth and Fifth Circuits' contentions, this Court has taken the government's

effective control over the message to be the touchstone for government speech.

Although some Circuits have tried to limit *Johanns* to the controlled subsidy context to avoid applying its effective control test, *see, e.g.*, *American Civil Liberties Union of North Carolina v. Tata*, 742 F.3d 563, 570 (2014), these efforts are unavailing because *Johanns* necessarily implicates government speech. The beef producers could assert a compelled subsidy claim only if they were "compelled ... to subsidize a private message with which they disagree." *Johanns*, 544 U.S. at 557. Thus, the threshold question was whether the "Beef, It's What's for Dinner" campaign was government or private speech.

In answering this question, *Johanns* focused exclusively on the government's control over the message. The advertisements were government speech because (i) "[t]he message of the promotional campaigns is *effectively controlled* by the Federal Government itself," (ii) "[t]he message set out in the beef promotions is from beginning to end the message *established by the Federal Government*," (iii) the government "*exercises final approval authority* over every word used in every promotional campaign," and (iv) the government "retains absolute *veto power* over the advertisements' content, right down to the wording." *Id.* at 560-63 (emphasis added). Given this level of control, the Court concluded that "[n]o more is required" and held that the ads were government speech. *Id.* at 564.

The majority also made clear that the government speech inquiry could be determined

without reference to the reasonable observer, which is why the respondents' compelled subsidy claim failed: "As we hold today, respondents enjoy no right not to fund government speech—whether by broad-based taxes or targeted assessments, and *whether or not the reasonable viewer would identify the speech as the government's.*" *Id.* at 564 n.7 (emphasis added). In his dissent, Justice Souter lamented that the majority had rejected his position—that the government speech doctrine should apply only if a third party would understand the government to be the speaker—in favor of this "control" test, which finds government speech where "Congress authorized this scheme and the Government controls (or at least has a veto on) the content of the beef ads." *Johanns*, 544 U.S. at 578 (Souter, J., dissenting).

When deciding whether the monuments in *Summum* were government speech, this Court followed *Johanns* and analyzed the level of authority that the government exercised over the monuments. As part of its explication of the general principles of the government speech doctrine in section II.A., this Court explained that "[a] government entity may exercise this same freedom to express its views when it receives assistance from private sources for the purpose of delivering a *government-controlled* message" and cited *Johanns* for the proposition that "where the government *controls the message*, 'it is not precluded from relying on the government-speech doctrine merely because it solicits assistance from nongovernmental sources.'" *Summum*, 555 U.S. at 468 (quoting *Johanns*, 544 U.S. at 562) (emphasis added).

Applying this test in the monument context, the Court held "it is clear that the monuments ... represent government speech." *Id.* at 472. Drawing directly on *Johanns*, the Court concluded that the monuments were government speech because "the City has 'effectively controlled' the messages sent by the monuments in the Park by exercising 'final approval authority' over their selection." *Id.* at 472-73 (quoting *Johanns*, 544 U.S. at 560-61). The "reasonable observer" played no role in this determination; the Court predicated government speech on the level of authority that government officials had over the speech, not on how third parties interpreted that speech.

Under a direct application of *Summum*, then, legislatively enacted specialty plates also are government speech. As with government commissioned monuments, no one disputes the "obvious proposition" that standard issue license plates are government speech. *Summum*, 555 U.S. at 470. A State selects the wording, design, and color scheme of its standard issue plate to convey something about the State. *See id.* (recognizing that a government entity commissions a monument "because it wishes to convey some thought or instill some feeling in those who see the structure").

The same is true for legislatively enacted specialty plates because, as the Fourth Circuit acknowledges, States with legislatively controlled specialty plate programs retain "complete editorial control" over the design and content of their specialty plates. *Tata*, 742 F.3d at 573. And they do so in the same way as government officials who decide whether to accept donated monuments—"through prior submission requirements, design

input, requested modifications, written criteria, and legislative approvals of specific content proposals." *Summum*, 555 U.S. at 472. Furthermore, legislatively approved specialty plates, like privately donated monuments, "portray what [government officials] view as appropriate for the place in question, taking into account such content-based factors as esthetics, history, and local culture." *Id.* Through specific legislation, a State selects only those specialty plates that it wants to display "for the purpose of presenting the image of the [State] that it wishes to project" to all who see its license plates. *Id.* at 473. Although third parties are free to propose certain specialty plates, they cannot impose their message on a State or force the state legislature to "adopt" or "embrace" the third parties' desired message. *Id.* at 473-74.

In this way, a State like North Carolina uses its specialty plates to promote unique or important aspects of the State and its citizens,[3] highlighting,

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[3] In *Vandergriff*, the Fifth Circuit majority asserted that "while public parks have traditionally been 'closely identified in the public mind with the government' and have 'play[ed] an important role in defining the identity [of] a city,' the same cannot be said for license plates and the backs of cars." 759 F.3d at 395. As anyone who has played the license plate game knows, this assertion is false. License plates—whether standard issue or specialty plates—promote certain features or images of States, including Florida's oranges, Colorado's mountains, Utah's red-rock arch, Idaho's potatoes, and New Hampshire's "Live Free or Die." *See, e.g.*, Karen Aho, "America's Favorite License Plate? Wyoming" (available at http://www.carinsurance.com/Articles/favorite-license-plates.aspx) (noting that "[l]icense plates entice travelers to visit the state.... In the CarInsurance.com

among other things, its concern with education (*e.g.*, collegiate plates, Kids First), civic groups (*e.g.*, Kiwanis, Knights of Columbus, Oasis Temple, and Lion's Club), sports (*e.g.*, Carolina Panthers, Carolina Hurricanes, and various NASCAR plates), conservation (*e.g.*, Save the Sea Turtles, North Carolina Coastal Federation, North Carolina State Parks, and North Carolina Trout Unlimited), and recreational opportunities (*e.g.*, golf, tennis, ocean, and mountains).[4] Accordingly, the specialty plates "that are accepted ... are meant to convey and have the effect of conveying a government message, and they thus constitute government speech." *Id.* at 472.

B. States Do Not Lose the Protection of the Government Speech Doctrine When Third Parties Voluntarily Display Legislatively Enacted Specialty Plates on Their Vehicles.

Once a state legislature approves a specialty plate, motorists are free to select and to display that message on their vehicles. To be sure, a State enlists these volunteers to disseminate its chosen

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survey, 13 percent of respondents said a plate had inspired a vacation or relocation....") (last visited on January 15, 2015).

[4] Given the variety of people, landmarks, and historical events associated with each State, it is not surprising that some States have authorized an array of specialty plates. *See Bredesen*, 441 F.3d at 376 (recognizing that "there is nothing implausible about the notion that Tennessee would use its license plate program to convey messages regarding over one hundred groups, ideologies, activities, and colleges. Government in this age is large and involved in practically every aspect of life.").

message. But as this Court has stated repeatedly, relying on others to propound the government's message does not cause the government to forfeit the protection of the government speech doctrine: "A government entity may exercise this same freedom to express its views when it receives assistance from private sources for the purpose of delivering a government-controlled message." *Id.* at 468; *Johanns*, 544 U.S. at 562 ("When, as here, the government sets the overall message to be communicated and approves every word that is disseminated, it is not precluded from relying on the government-speech doctrine merely because it solicits assistance from nongovernmental sources in developing specific messages."); *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995) (stating that a government entity may "regulate the content of what is or is not expressed ... when it enlists private entities to convey its own message.").

If this Court were to hold otherwise, then, as the Sixth Circuit noted in *Bredesen*, third parties could force the government to proffer messages contradicting its chosen message in a variety of contexts. Having distributed pins saying "Register and Vote" or stamps saying "Win the War" during World War II, the government could be required to give out "Don't Vote" pins or "Stop the War" stamps. *See Bredesen*, 441 F.3d at 379; *accord Rust v. Sullivan*, 500 U.S. 173, 194 (1991) ("When Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles, ... , it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and

fascism.").[5] The government speech doctrine precludes such a result.

Moreover, the government retains the protection of the government speech doctrine even if a private person, who assists in creating or disseminating the government's chosen message, also seeks to engage in expressive activity. *See Summum*, 555 U.S. at 476 ("the thoughts or sentiments expressed by a government entity that accepts and displays [a monument] may be quite different from those of either its creator or its donor."). Given that monuments may convey multiple messages, those who observe a monument may interpret it in myriad ways and may even attribute a message to a third party (*e.g.*, the creator or donor) without causing the government to lose the protection of the government speech doctrine. *Id.* at 474 ("Even when a monument features the written word, the monument may be intended to be interpreted, and may in fact be interpreted by different observers, in a variety of ways."). Provided that government officials exercise

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[5] Legislatively enacted specialty plate programs do not preclude motorists with opposing views from communicating their opposition through other traditional means of expression—bumper stickers, window decals, license plate frames, or paint schemes. *See Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct 2321, 2330 (2013) (explaining that "[b]ecause the regulations [n *Rust*] did not 'prohibit[ ] the recipient from engaging in the protected conduct outside the scope of the federally funded program,' they did not run afoul of the First Amendment.") (quoting *Rust*, 500 U.S. at 197); *Rust*, 500 U.S. at 198-99 ("The regulations, which govern solely the scope of the Title X project's activities, do not in any way restrict the activities of those persons acting as private individuals.").

"effective control" over the monument selection, the speech remains government speech.

The same is true for legislatively enacted specialty plates. A vehicle owner may like a particular specialty plate and choose to put it on her vehicle for any number of reasons—because she (i) wants to help the State spread its message, (ii) wants to financially support a group that receives some of the revenues from that plate, (iii) likes the color and design, (iv) thinks others will be impressed that she has such a plate, or (v) some other reason. Under *Summum*, both the State and the driver are free to engage in expressive activity through the specialty plate (just as the Fraternal Order of Eagles could express a message about juvenile delinquency even though the government adopted the Ten Commandments monument for its own purposes).[6] Yet, as in the monument context, the speech remains government speech because the government has effective control over the content and design of the plate.

Furthermore, the fact that vehicle owners are willing to pay more for the privilege of carrying the government's message does not morph government speech into private speech. As *Summum* explains, there are good reasons why the government relies on private funding before engaging in certain speech activity: "By accepting monuments that are privately funded or donated, government entities save tax dollars and are able to acquire monuments that they could not have afforded to fund on their own." *Summum*, 555 U.S. at 471. States require that a

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[6] *See Van Orden v. Perry*, 545 U.S. 677, 682-83 (2005).

certain number of drivers sign up for a specialty plate before beginning production for the same reasons: to ensure that the cost of production is covered and to promote various aspects of the State that it might not otherwise have been willing to fund (through the specific messages on their specialty plates as well as through the moneys that are distributed to groups working on causes related to those plates).[7] Regardless of the varying reasons drivers may have for volunteering to carry the State's message, the legislature enacts the specialty plate for its own expressive purposes. *See id.* at 476-77 ("Indeed, when a privately donated memorial is funded by many small donations, the donors themselves may differ in their interpretation of the monument's significance. By accepting such a monument, a government entity does not necessarily endorse the specific meaning that any particular donor sees in the monument."). These legislatively enacted specialty plates, therefore, are government speech.

Rust confirms this conclusion. Under *Rust*, a State could pay willing citizens to display specific specialty plates, such as "Choose Life," on their vehicles: "the government may 'make a value judgment favoring childbirth over abortion, and ... implement that judgment by the allocation of public funds.'" 500 U.S. at 192-93 (quoting *Maher v. Roe*, 432 U.S. 464, 474 (1977)). But if the government can

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[7] *See, e.g.*, N.C.G.S. § 20-79.7(a)(1) (specifying that $15.00 from every "Choose Life" plate would go to the Carolina Pregnancy Care Fellowship, a private organization that funds and supports crisis pregnancy centers in North Carolina).

establish the same program without expending public funds, there is no basis for suddenly treating the speech as private. *See Bredesen*, 441 F.3d at 378 ("There is nothing in the Supreme Court's decisions in *Rust* or *Johanns* that implies that the government has less right to control expressions of its policies when it relies on unpaid private people. No constitutionally significant distinction exists between volunteer disseminators and paid disseminators."). That the State may have to wait until enough motorists agree to cover the costs of producing a new specialty plate is no different from the government's approving the design of a memorial but waiting to begin construction until enough donations are received to cover the cost of the monument. Once funded and produced, the resulting speech—whether a monument or a legislatively enacted specialty plate—is government speech.

C. *Summum*'s Control Test Does Not Give Government Officials Unfettered Authority to Control Public Debate.

Requiring that the government retains effective control over its speech ensures that (i) the government actually is speaking and (ii) is able to carry out its functions without being subject to a heckler's veto. *See Nat'l Endowment for Arts v. Finley*, 524 U.S. 569, 598 (1998) (Scalia, J., concurring in judgment) ("It is the very business of government to favor and disfavor points of view"); *Johanns*, 544 U.S. at 574 (Souter, J., dissenting) ("To govern, government has to say something, and a First Amendment heckler's veto of any forced contribution to raising the government's voice in the

'marketplace of ideas' would be out of the question."). But the "effective control" test does not give government officials unlimited authority to control public debate. As the Court notes in *Summum*, government speech is limited in several ways: (i) the Establishment Clause, (ii) laws, regulations, or practices that restrict public officials' involvement in advocacy, and (iii) the fact that government officials are "ultimately 'accountable to the electorate and the political process for its advocacy.'" *Summum*, 555 U.S. at 468 (quoting *Bd. of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 235 (2000)).

The control test also recognizes that the government may create a forum for private expression subject to the constraints of the First Amendment when it cedes some or all of its control over the content of the speech. The Court makes this point expressly in *Summum* in relation to the government's control over monuments:

> To be sure, there are limited circumstances in which the forum doctrine might properly be applied to a permanent monument—for example, if a town created a monument on which all of its residents (or all those meeting some other criterion) could place the name of a person to be honored or some other private message.

Id. at 480. But the Court nowhere suggests that relinquishing control over the content of this monument would cause the government to forfeit its right to speak through other monuments over which it retained effective control.

The same holds true for specialty license plates. In North Carolina, for example, the legislature must

pass and the governor must sign a statute specifically authorizing all new specialty license plates. *See* N.C.G.S. § 20-79.3A. The only exceptions are for national civic organizations and colleges and universities. *See* N.C.G.S. § 20-79.4(b)(42) (allowing specialty plates for "a nationally recognized civic organization whose member clubs in the State are exempt from State corporate income tax" and are operated exclusively for the promotion of the general welfare) and § 20-81.12 (allowing specialty plates bearing college insignia once 300 applications are received). With respect to these two types of specialty plates, the North Carolina legislature allows civic groups and colleges to place their logos or insignia on its specialty plates without going through the normal legislative process, just like the hypothetical city in *Summum* allowed residents to honor a person or to place a private message on one of its monuments. As a result, North Carolina cannot discriminate based on the viewpoint of the civic organizations or colleges that meet the general statutory requirements. But North Carolina retains complete control over all other specialty plates and, therefore, can select only those plates that express views with which it wants to be associated.

II. The Reasonable Observer Test Not Only Is Inconsistent with *Johanns* and *Summum*, but also Is Predicated on a Fundamental Misunderstanding of *Wooley*.

The majority of lower courts that have considered specialty license plates have adopted a reasonable observer test, which is derived from the Fourth Circuit's multi-factor test. *See Choose Life of Ill., Inc. v.*

White, 547 F.3d 853, 863 (7th Cir. 2008) (concluding that the Fourth Circuit's test "can be distilled (and simplified) by focusing on the following inquiry: Under all the circumstances, would a reasonable person consider the speaker to be the government or a private party."). Consistent with Justice Souter's concurrence in *Summum*, this test asks "'whether a reasonable and fully informed observer would understand the expression to be government speech, as distinct from private speech the government chooses to oblige.'" *Vandergriff*, 759 F.3d at 394 (quoting *Summum*, 555 U.S. at 487 (Souter, J., concurring)).

The reasonable observer test is an untenable standard for determining whether the government is speaking for at least two reasons (beyond the fact that it garnered only one vote in *Summum*). First, predicating government speech on a reasonable observer contradicts *Johanns* and *Summum*. If a reasonable observer's identifying the government as the speaker is all that is required, then *Johanns* should have come out differently, and *Summum* should have expounded on the reasonable viewer standard instead of simply mentioning the concept quickly at the end of one paragraph in Section III to highlight why *Summum* was not a difficult case. The Court did neither of these things.

Second, the courts that have applied the reasonable observer test to specialty plates do so based on a misinterpretation of *Wooley*. Although a reasonable observer might have attributed "Live Free or Die" to the Maynards, which was necessary for their compelled speech claim, the reasonable observer played no role in the Court's determination

that the motto was the "*State's* ideological message." 430 U.S. at 715.

A. The Reasonable Observer Test Contradicts This Court's Reasoning in *Johanns* and *Summum*.

In *Johanns*, this Court held that the "Beef, It's What's for Dinner" ads were government speech even though a reasonable observer would not identify the government as the speaker. In fact, *Johanns* rejected respondents' claim that "[c]ommunications cannot be 'government speech,' ... if they are attributed to someone other than the government." *Johanns*, 544 U.S. at 564-65; *Id.* at 577 (Souter, J., dissenting) (disagreeing with the majority's conclusion—that the ads were government speech—because "the ads are not required to show any sign of being speech by the Government, and experience under the Act demonstrates how effectively the Government has masked its role in producing the ads."). As the Court explained, the "correct focus is not on whether the ads' audience realizes the Government is speaking, but on the compelled assessment's purported interference with respondents' First Amendment rights." *Id.* at 564 n.7. Given that the government "effectively controlled" the advertising messages and exercised "final approval authority" over their content, the ads were government speech. The respondents, therefore, could not bring a compelled subsidy claim "whether or not the reasonable viewer would identify the speech as the government's." *Id.* Thus, the reasonable observer test is directly at odds with *Johanns*.

Given that *Summum* applies *Johanns*, it is not surprising that *Summum* also does not support a reasonable observer test.[8] Although *Summum* made passing reference to the fact that "persons who observe donated monuments routinely—and reasonably—interpret them as conveying some message on their behalf," it did not adopt a reasonable person standard. *Id.* at 471. Instead, as discussed above, the Court repeatedly emphasized the government's control over the message. The reasonable observer test, therefore, is inconsistent with *Summum* because that test focuses exclusively on how a viewer interprets the message, rendering the level of control irrelevant to the government speech analysis. *See Johanns*, 544 U.S. at 578 (Souter, J., dissenting) ("It means nothing that Government officials control the message if that fact is never required to be made apparent to those who get the message, let alone if it is affirmatively concealed from them.").

The Fourth and Fifth Circuit decisions demonstrate that control plays no significant role under the reasonable observer and multi-factor tests. In *Vandergriff*, the majority held that Texas's administrative procedure fostered private speech. But the majority noted that it would have reached the same result even if Texas, like Tennessee in *Bredesen*, had complete control over the specialty plate program. *Vandergriff*, 759 F.3d at 396 (distinguishing *Bredesen* based on the level of control

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[8] In *Summum*, Justice Souter sought to resurrect his reasonable observer test, but no other Justice joined his concurring opinion. *Summum*, 555 U.S. at 487 (Souter, J., concurring).

but stating that "we would decline to follow *Bredesen*" regardless of that distinction). Similarly, the Fourth Circuit concluded that North Carolina's specialty plates were private speech even though it had complete editorial control. *See Tata*, 742 F.3d at 573. Accordingly, because *Vandergriff* and *Tata* always associate specialty plates with the vehicle owners, the entity or person controlling the messages on those plates—whether a legislature, agency, or private person—does not matter to the government speech analysis (which is why these Circuits contend that *Bredesen* was decided wrongly).

Under *Summum*, however, the distinction between complete and partial control is critical. Just as there is a constitutionally significant difference between monuments that the government controls and those that are opened to the public to "place the name of a person to be honored or some other private message," there is a constitutionally significant difference between administratively controlled and legislatively controlled specialty plate programs. *Summum*, 555 U.S. at 480. *Compare Stanton*, 515 F.3d at 966 (holding that Arizona's administrative procedure for specialty license plates created a limited forum given "[t]he Commission's de minimis editorial control over the plate design and color") *with Bredesen*, 441 F.3d at 376 (concluding that Tennessee's "Choose Life" specialty plate was government speech because the State "approved every word to be disseminated," "set the overall message and the specific message," and "retains a veto over its design".). Any standard that ignores *Johanns*'s and *Summum*'s extended discussions of

government control, therefore, is inconsistent with those decisions.

Consequently, because the reasonable observer standard contradicts *Johanns* and renders the level of governmental control over the speech irrelevant, this Court should reject that standard.

B. Because *Wooley* Interpreted New Hampshire's License Plate as Government Speech, It Provides No Support for the Reasonable Observer Test.

The lower courts that rely on a reasonable observer or multi-factor test display a fundamental misunderstanding of *Wooley* and the government speech doctrine. These courts contend that *Wooley* is incompatible with any type of control test for government speech. As the Fourth Circuit puts it, if *Johanns* establishes that "control of the message is all that matters, both *Wooley* and *Barnette* would have been wrongly decided." *Tata*, 742 F.3d at 570; *Vandergriff*, 759 F.3d at 395 (stating that *Wooley* "presumed that the license plates were private speech.").

While recognizing that *Wooley* is a compelled speech case, these Circuits disregard the fact that the constitutional violation arose only because the State sought to force the Maynards to "use their private property as a 'mobile billboard' for the *State's ideological message*." *Wooley*, 430 U.S. at 715 (emphasis added). That a reasonable observer might attribute the message to the Maynards enabled them to bring a compelled speech claim, but that fact had no bearing on whether "Live Free or Die" was New

Hampshire's message. The Court determined that New Hampshire's standard issue license plate was government speech, which made good sense given that New Hampshire controlled the entire license plate process (from owning the license plate to selecting the message). The First Amendment violation, though, resulted from New Hampshire forcing its citizens to carry *its* message.

Of course, specialty plates do not even implicate the central issue in *Wooley*—compelled speech. States authorizing specialty plates do not require anyone to display a specialty plate. Instead of being forced to be "the courier for such [governmental] message," motorists consent to carrying that message. *Wooley*, 430 U.S. at 717; *Summum*, 555 U.S. at 468. Thus, because *Wooley* addresses a separate constitutional issue, confirming that the government's level of control is critical to the government speech inquiry does not overturn *Wooley* or *Barnette*.

III. This Court's Forum Doctrine and Its Corollary Viewpoint Non-discrimination Principle Are Inapplicable to a Program in Which the Government Speaks Its Own Message.

Summum provides an alternative basis for rejecting the application of this Court's forum doctrine to legislatively enacted specialty plates: "'[P]ublic forum principles... are out of place in the context of this case.'" *Summum*, 555 U.S. at 478 (quoting *United States v. American Library Assn.*, 539 U.S. 194, 205 (2003)). In *Summum*, the Court noted that the park could "accommodate only a

limited number of permanent monuments" given its size. *Id.* at 480. But the Court refused to apply the forum doctrine because doing so would undermine the City's policy of selecting only those monuments that conveyed a message that the City supported: "[t]he forum doctrine has been applied in situations in which government-owned property or a government program was capable of accommodating a large number of private speakers without defeating the essential function of the land or program." *Id.* at 479. If private speech interferes with the "essential function" of the government's land or program, then the Court eschews its forum doctrine.

By refusing to apply its forum doctrine in such situations, the Court protects the government's ability to avoid sending messages that conflict with its chosen message. Thus, the City could not be required to accept the Summum monument—or any other monument—if the City determined that the monument interfered with its intended message. Otherwise, "[e]very jurisdiction that has accepted a donated war memorial may be asked to provide equal treatment for a donated monument questioning the cause for which the veterans fought." *Id.* at 480.

The same analysis applies to legislatively enacted specialty plates. To see why, consider the specialty plate analogue to a donated war memorial. If a State legislature approves a "Support Our Troops" or "Veterans of Foreign Wars" specialty plate and this Court's forum doctrine applied, then the State legislature would have to issue specialty plates disparaging our troops and questioning the causes for which our veterans fought. That is, the State

would be forced to approve conflicting messages—even though it retains complete control over its specialty plate program—thereby undermining its right "to select the view that it wants to express." *Id.* at 468.

Of course, what is true with respect to military specialty plates would also be true for other specialty plates. To avoid impermissible viewpoint discrimination, State legislatures must either allow opposing viewpoints on any existing specialty plate—which would lead to a proliferation of plates advancing positions with which the States disagree—or do away with those plates, precluding its ability to "say what it wishes." *Rosenberger*, 515 U.S. at 833; *Summum*, 555 U.S. at 480 ("If government entities must maintain viewpoint neutrality in their selection of donated monuments, they must either 'brace themselves for an influx of clutter' or face the pressure to remove longstanding and cherished monuments.").

For example, having issued a "Save the Sea Turtles" plate, which expresses a State's concern for and pride in its coastal wildlife, the legislature may be required to issue a plate expressing an alternative viewpoint, such as "Kill the Sea Turtles" or "Let the Sea Turtles Die." Under this Court's forum doctrine, when confronted with such an alternative, the State would have to accept the proposed plate (thereby promoting a message directly at odds with its chosen view) or do away with the "Save the Sea Turtles" plate. But this directly contravenes *Summum*. *See Id.* at 480 (denying that a city that adopted a war memorial would have to "provide equal treatment for a donated monument questioning the cause for which the veterans fought.").

Contrary to the suggestion of some Circuits, this concern is not idle speculation. For example, the Fourth Circuit, like the "respondent and some of its *amici*" in *Summum*, "deride[s] the fears expressed about the consequences of the Court of Appeals holding in this case." *Summum*, 555 U.S. at 479; *Tata*, 742 F.3d at 575 ("North Carolina then sounds the death knell for specialty plates, predicting a 'flood' of 'Kill the Sea Turtles' and 'Children Last' plates that will force it to end its specialty plate program."). But, as this Court explained in *Summum*, "those concerns are well founded." *Summum*, 555 U.S. at 479. In fact, this Court illustrated the problem that State legislatures would face if the forum doctrine applied to legislatively enacted specialty plates:

> On this view, when France presented the Statue of Liberty to the United States in 1884, this country had the option of either (a) declining France's offer or (b) accepting the gift, but providing a comparable location in the harbor of New York for other statues of a similar size and nature (*e.g.*, a Statue of Autocracy, if one had been offered by, say, the German Empire or Imperial Russia).

Id. But *Summum* refused to impose any such requirement on government officials, upholding their right to reject private speech that conflicts with the message they seek to send through their government-controlled property and programs.

Because applying this Court's forum doctrine to monuments or specialty plates would defeat "the essential function of the land or program," this Court's "forum analysis is out of place" in this case.

Legislatively enacted specialty plates, like government-controlled monuments, therefore, are government speech. *Id.* at 478, 480.

CONCLUSION

As this Court explained in *Summum*, "it is not easy to imagine how government could function if it lacked th[e] freedom ... 'to say what it wishes' and to select the views that it wants to express." *Id.* at 467-68 (citations omitted). Because the reasonable observer and multi-factor tests preclude a State from doing just that—even though it retains complete control over its specialty plate program—this Court should affirm the "effective control" test in *Johanns* and *Summum*.

Respectfully submitted,

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